United Nations AT/DEC/1209

Administrative Tribunal

Distr.: Limited
31 January 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1209

Case No. 1296: EL-ANSARY Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of Mohamed El-Ansary, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 2003 the time limit for the filing of an application with the Tribunal;

Whereas, on 21 May 2003, the Applicant filed an Application requesting the Tribunal, inter alia, to find:

> 8. ...
>
> (a) that the Secretary-General failed to carry out a fair and correct selection process for the [P-5 position of Chief, Copy Preparation and Proofreading Section,] since his representatives provided inaccurate or incomplete information to the Appointment and Promotion Board (APB) with respect to the managerial qualifications of the staff member selected for the post ...
>
> (b) that the Secretary-General's representatives had also informed in error the APB 'that there were questions regarding [the Applicant's] people management skills', which resulted in his non-selection for the post ...

(c) accordingly, that the selection process was tainted by inaccuracies and prejudicial statements and there was denial of due process in respect of the Applicant. ...

9. [And] to order:

(a) that [the Applicant] be given compensation equivalent to the difference between his emoluments at the P-4 [step 13] and P-5 levels for a period of at least two years; and,

(b) that he be further awarded compensation for the damage to his professional reputation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2003 and once thereafter until 30 November 2003;

Whereas the Respondent filed his Answer on 7 November 2003;

Whereas the Applicant filed Written Observations on 24 February 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"*Employment history*

... [The Applicant] was recruited in July 1980 on a two-year fixed-term appointment as an Arabic Proofreader at the P-2 level in the Department of Conference Services at Headquarters. In July 1982, he was granted a probationary appointment, and, in December of that year, became Chief, Arabic Group, Copy Preparation and Proofreading Unit. [The Applicant] was granted a permanent appointment and promoted to the P-3 level effective April 1983. He was promoted to P-4 in October 1986.

Summary of facts

... Responding to a vacancy announcement, [the Applicant], on 19 June 1998, submitted his application for the P-5 post of Chief of what had become the Copy Preparation and Proofreading Section (CPPS). Having been informed by a letter of 30 July 1998 from ... [the] Executive Officer, [Department of General Assembly Affairs and Conference Services (DGAACS)] that the Department had recommended another candidate, [the Applicant] submitted additional information to the [APB] on 10 August 1998. On 2 September 1998, [the] Secretary, APB, wrote to inform him that he had not been selected for the post.

... In a memorandum addressed to the Secretary-General on 12 October 1998, [the Applicant] requested an administrative review of the decision not to select him for the post."

On 15 December 1998, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 30 April 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
>
> 10. The Panel began its discussion recognizing that it could not, as requested by [the] Appellant, recommend that the promotion of another staff member be revoked, nor could it substitute its judgement for that of the APB.
>
> ...
>
> 11. The Panel had no doubt that ... [the] memorandum [of the Secretary, APB,] of 13 November 1998 ... was an accurate account of the APB's deliberation ...
>
> 12. [The] Appellant has submitted a number of documents ... including several originating in the Staff Union, that put in doubt the favourable evaluation of [the Chief, Distribution Section's] managerial qualifications. ...
>
> ...
>
> The Panel could only thus conclude that the representatives of DGAACS had provided inaccurate or incomplete information to the APB with respect to [the Chief, Distribution Section's] managerial qualifications.
>
> 13. Conversely, the same representatives had informed the APB 'that there were questions regarding [the Appellant's] people management skills'. The Panel found no evaluation of those skills in [the] Appellant's Official Status file, with the possible exception of the PAS for the period April 1997 to March 1998 which stated:
>
> > 'Has a very good record of supervising the unit with very good results in efficiency. ...
> >
> > Maintain (*sic*) co-operative working relations within the unit; develops a co-operative and inclusive team work environment which results in high production with quality.'
>
> Thus, the negative appraisal given orally to the APB was one which [the] Appellant had no opportunity to rebut, and was a denial to him of due process.
>
> Having concluded that the information provided by the Department to the APB was defective by [the] Respondent's own standard of objectivity ... and that [the] Appellant was, therefore, denied due process, the Panel turned to a discussion of the possible remedies it could propose and the rationale for it. It concluded that, while it could not recommend promotion, an appropriate indemnity would be based on the difference in emoluments between the P-4 and P-5 levels.
>
> ***Recommendation***
>
> 15. The Panel recommends to the Secretary-General that [the] Appellant be paid an indemnity equal to the difference in base salary between the P-4 and P-5 levels (step 1, in both cases) for a period of six months.
>
> ..."

On 31 December 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General regrets that, though the Board emphasized in paragraph 10 of its report, that it cannot substitute its judgement for that of the APB, it did just that in this case. The comparative evaluation of candidates is entrusted to the APB. Though candidates may understandably sometimes be tempted to compare themselves to the other candidates, this is not what the process envisages. Similarly, it is not for the Joint Appeals Board to undertake such comparative evaluation and to second guess the APB, as doing so would jeopardize the process and functions that have been entrusted to that joint advisory body. Moreover, the Secretary-General notes that you were invited to submit additional information to the APB in support of your candidature. You did so and the APB considered the additional information you submitted and nevertheless did not recommend you for the post. For all these reasons, the Secretary-General does not accept the conclusions of the Board that the APB process was defective or that you were denied due process. He has accordingly decided not to accept the recommendation of the Board and to take no further action on your case."

On 21 May 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's qualifications were not fully and fairly considered in the promotion process.

2. The information proved to the APB was defective, in effect, erroneous under the Secretary-General's own standard of objectivity and fairness, and the Applicant was therefore denied due process.

Whereas the Respondent's principal contentions are:

1. Staff members have no right to promotion but only to consideration for promotion, regardless of good performance evaluation and length of service. The Applicant was fully and fairly considered for promotion, and his rights were not violated by the decision not to select and promote him to the P-5 post he sought.

2. The Applicant's due process rights were respected.

3. The contested decision was not tainted by prejudice, improper motive or other extraneous factors.

4. Neither the Applicant, nor the JAB, nor the Tribunal can substitute their judgement for that of the APB.

The Tribunal, having deliberated from 4 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenges a decision by the Respondent not to promote him to the P-5 position of Chief, Copy Preparation and Proofreading Section. The Applicant asserts that the promotion process was flawed because representatives of the Respondent provided inaccurate information and advice to the APB, in relation to both the Applicant and Ms. S., the candidate who ultimately was successful in obtaining the post. The Applicant further alleges that the tainted application process led to a denial of his rights to due process and that he was not fully and fairly considered. The Respondent, in defence, asserts his broad discretionary power of promotion, alleging that the Applicant was indeed fully and fairly considered by the APB, which carried out its duties in accordance with appropriate and fair procedures. The Applicant seeks compensation for the alleged violation.

II. The Tribunal "recognizes that the selection of a staff member for any post in the United Nations falls within the discretionary power vested in the Secretary-General". (See Judgement No. 1117, *Kirudja* (2003).) Thus, "qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion". (See Judgment No. 958, *Draz* (2001).)

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not absolute; the Administration's discretion shall be reviewed when there are allegations of abuse of discretion. (See, *Kirudja* (*ibid.*) citing Judgement No. 870 *Choudhury* and *Ramchandani* (1998).) Article 101 of the Charter and staff regulation 4.2 provide that "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". In order to achieve this purpose, it is imperative that "full and fair consideration" be given to all applicants for a post. (See Judgement No. 828, *Shamapande* (1997).) In paragraph VI of *Shamapande*, the Tribunal stated:

> "The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. In Judgement No. 447, *Abbas* (1989), the Tribunal further specified that 'reasonable' and 'measurable' were the standards

> applicable in such cases. '... such consideration should to some measurable degree meet the criterion of 'fullest regard' in a reasonable manner'."

The burden of establishing that the Administration has failed to fully and fairly consider the Applicant's candidacy, however, does not fall on the Applicant. Rather, as the Tribunal held in Judgement No. 362, *Williamson* (1986), para. VII:

> "If once called seriously into question, the [Respondent] must be able to make at least a minimal showing that the [Applicant's] statutory right was honoured in good faith in that the [Respondent] gave the 'fullest regard' to it".

Thus, while the Tribunal recognizes that it cannot substitute its judgement for that of the APB, and thus, will not examine the qualifications of the Applicant, vis-à-vis those of the successful candidate and whether the Applicant might have gotten the post, the Tribunal must assess whether the Applicant was fully and fairly considered in the promotion process.

III. The Applicant's management skills were, if not the decisive factor in the decision not to promote him, at least a tremendously significant factor. Thus, it is crucial to the Tribunal's determination of full and fair consideration to determine whether the statements to the APB by the Programme Manager were true and therefore warranted, or whether they were inaccurate or made in circumstances which were damaging to the fairness of the process.

In the context of the promotion process, the Applicant's management skills were called into question by the Programme Manager. In making its recommendation to promote Ms. S. rather than the Applicant

> "[T]he APB paid particular attention to the assessment of Ms. [S] and [the Applicant] [vis-à-vis] the managerial and leadership ability required by the post. It took note of the statement of the Department that 'given the serious managerial challenges awaiting the new Chief of the Section', the post required a 'strong leader who would command respect and be able to provide direction and guidance to the staff'. ... The Programme Manager recognized [the Applicant's] considerable experience in the Section and evaluated him as highly qualified from a technical point of view; however, while he had often served as Officer-in-Charge of the Section, 'there were questions regarding his people management skills'."

It is this last sentence that the Applicant alleges is inaccurate, which reflected negatively on his chance for promotion and which therefore prevented him from being considered fully and fairly in the promotion process.

The Respondent argues that the Applicant was accorded full and fair consideration: namely, that:

> "(a) the APB informed the Applicant that his Department had recommended another candidate;
>
> (b) it gave the Applicant the opportunity to submit further information relating to his suitability for the post;
>
> (c) it duly considered such additional information and concluded that another candidate was better suited for the post than the Applicant;
>
> (d) the result of the selection procedure was promptly communicated to the Applicant."

Although it appears to the Tribunal that indeed all of these procedures were followed, the Respondent's assertions beg the question of full and fair consideration. The Secretary-General has established, through staff rules, a formal review process which not only provides rights and benefits to the staff members, but which also obligates the Respondent to respect the rules and procedures of such process. The essential features of this review system include the requirements that a performance report be prepared annually by a staff member's supervisor and that such performance reports form part of the staff member's personnel file. Staff members are to be evaluated for their efficiency, competence and integrity through a performance appraisal mechanism to assess compliance with the standards set out in the Staff Regulations and Rules for the purpose of accountability.

Although the Applicant was invited to submit additional information in support of his candidature, after he was notified that another candidate was preferred, he was never told that his management skills were being questioned. Therefore, he was not afforded the opportunity to defend his skills against negative allegations that he alleges were inaccurate and incorrect. Based on the Tribunal's review of the official performance reviews in the record, the Tribunal would have to agree with the Applicant, that the comments made by the Respondent with respect to his management skills were not borne out by those official reviews. It should be self-evident that the making of any informal comments without the Applicant having the opportunity to rebut those comments is a flagrant contradiction of transparency of the Staff Rules and cannot be tolerated.

The Tribunal notes that, in fact, the Applicant's PER covering the period of 1 February 1992 to 31 March 1996, as well as his PAS for the period 1 April 1997 to 31 March 1998 make no mention of any managerial defect but make rather positive comments in this regard. This positive, official assessment of the Applicant's management is further borne out by the fact that for years, both before and after the promotion exercise, the Respondent appointed the Applicant to be Officer-in-Charge of the Section. It belies common sense that the Respondent would repeatedly entrust the Applicant with such a significant position requiring managerial skills if the criticism made by the Programme Manager were actually justified, *i.e.*, if there were a problem with "his people management skills". Therefore, the Tribunal finds that the statement by the Respondent in the promotion process, which raised questions about, and cast a negative light on, the Applicant's management skills, was inaccurate and untrue, based upon the assessments of those skills made by the Respondent himself in the context of general staff member evaluations. It was also inconsistent with the repeated and continuous appointment of the Applicant as Officer-in-Charge.

IV On this point, the Respondent further asserts that his concerns about the Applicant's people management skills did not pertain to the Applicant's past abilities, but instead to his ability to manage in the future. The Respondent asserts that the job called for a strong leader, and while the Applicant was technically excellent, the Programme Manager had doubts about the Applicant's ability to lead and manage, on a going-forward basis. The Tribunal cannot agree with this reasoning. In assessing the Applicant's future performance, the Respondent could obviously only rely on past assessments of the Applicant's skills. There simply was no basis for concluding that future management skills would prove more negative than the positive evaluations of those skills the Applicant had consistently received in his performance evaluations. Thus, the Tribunal finds that the Applicant was not fully and fairly considered in the promotion process, and for this he is entitled to be compensated.

Finally, the Tribunal feels compelled to comment on the Secretary-General's characterization of the JAB's recommendations. In his letter to the Applicant dated 31 December 2002, the reason stated for rejecting the JAB's recommendations is that "though the [JAB] emphasized ... that it cannot substitute its judgement for that of the APB, it did just that in this case". The Tribunal finds this is a mischaracterization of the JAB's conclusions. In fact, the JAB did not substitute its judgement for that of the APB; it merely concluded that the Administration had provided inaccurate information

with respect to Ms. S and that the Applicant had been denied due process by virtue of the failure of the Administration to allow him to rebut the informal negative comments about his management skills. The JAB's recommendation related only to compensation for the determined due process violation; the JAB did not in any way suggest that the Applicant should have been promoted. It appears to the Tribunal that, in this case, the JAB performed its functions appropriately, and the Tribunal supports its findings of fact and its conclusion that the Applicant's rights were violated, in that he did not receive full and fair consideration for the promotion. Likewise, the Tribunal agrees with the compensation awarded by the JAB.

V. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant the difference in emoluments between the P-4 and P-5 levels at step 1, at the rate in effect on the date of the Judgement, in accordance with the conclusions of the JAB, for the failure to fully and fairly consider him in the promotion process.
2. Rejects all other pleas.

(*Signatures*)

Kevin **Haugh**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary